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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARGUERITE HIKEN and) Case Number: C 06-02812 (MHP)
THE MILITARY LAW TASK FORCE,)
Plaintiffs,)
v.)
DEPARTMENT OF DEFENSE AND)
UNITED STATES CENTRAL COMMAND)
Defendants.)
) MOTION FOR LEAVE TO FILE
) MOTION FOR CLARIFICATION AND
) PARTIAL RECONSIDERATION

1 PLEASE TAKE NOTICE that Defendants hereby move this Court to grant Defendants
 2 leave to file the attached proposed Motion for Clarification and Partial Reconsideration of the
 3 Court's Order of February 2, 2012 (Dkt. No. 94) ("2012 Order").¹

4 In the almost four years since the parties last provided any briefing on the issues covered
 5 by the 2012 Order, there have been significant changes in both the law surrounding the Freedom
 6 of Information Act ("FOIA"), 5 U.S.C. § 552 (2006), and the relevant facts. In light of the 2012
 7 Order, these matters need to be addressed, and Defendants should therefore be permitted to seek
 8 partial reconsideration.

9 Defendants also request clarification of certain requirements of the 2012 Order.
 10 Depending on what clarification, if any, the Court provides, reconsideration of these issues may
 11 not be necessary. In any event, such clarification and partial reconsideration may eliminate
 12 future disputes regarding whether or not Defendants have adequately complied with the 2012
 13 Order, and thus conserve the resources of both the Court and the parties (and ultimately the court
 14 of appeals, if any party were to seek appellate review of an adverse decision).

15 **STATEMENT OF ISSUE**

16 Whether Defendants should be granted leave to file the attached proposed Motion for
 17 Clarification and Partial Reconsideration of the Order of February 2, 2012, given the significant
 18 changes in law and facts since the issues in Order were originally briefed.

19 **STATEMENT OF FACTS**

20 In 2006, Plaintiffs Marguerite Hiken and the Military Law Task Force ("Plaintiffs") filed
 21 a complaint against Defendants Department of Defense and U.S. Central Command ("Central
 22 Command," collectively "Defendants") seeking the disclosure under FOIA of certain documents
 23 relating to the death of Nicola Calipari. The parties all moved for summary judgment, and in
 24 2007, the Court issued an order in response to this motion. Although the 2007 Order denied

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 26 ¹ Under Local Civil Rule 7-9(d), no hearing will be held concerning a motion for leave to file a
 27 motion to reconsider unless ordered by the Court. If the Court orders a hearing, the Court will
 28 fix an appropriate schedule. Accordingly, Defendants have not noticed this motion or their
 proposed Motion for Clarification and Partial Reconsideration for hearing.

summary judgement to both parties and required Defendants to produce additional information, the Court upheld many of Defendants' withholdings. *See* Mem. and Order (Dkt. 53), filed Oct. 2, 2007 ("2007 Order"), at 14, 22. In particular, as relevant here, the Court held that Defendants had adequately justified their withholding of classified information under Exemption 1, 5 U.S.C. § 552(b)(1), and their withholding of names and similar personally identifying information under Exemption 6, 5 U.S.C. § 522(b)(6). *See* 2007 Order at 14, 22.

The parties later filed renewed motions for summary judgment, and almost four years after the end of the related briefing, the Court issued the 2012 Order. In this Order, the Court ruled that Defendants were entitled to withhold several categories of information under FOIA. *See, e.g.*, 2012 Order at 13, 15, 18, 24. In marked contrast to the 2007 Order, however, the Court raised newfound concerns about some of the Defendants' Exemption 1 and Exemption 6 withholdings in its 2012 Order and ordered disclosure or additional filings on the basis of those concerns. *See* 2012 Order at 11-13, 19-20, 24. The Order also required Defendants to show why certain classified information related to the Iraq War still needed to be classified, *id.* at 13, 24, which Defendants did in their filing of February 27, 2012 (Dkt. No. 96).

ARGUMENT

The Local Civil Rules place certain limitations on parties' ability to move for reconsideration. The rules do not so limit motions for clarification, but, given the close link between Defendants' requests for clarification and reconsideration, Defendants nonetheless file these requests as part of a single motion, and seek the Court's leave to do so.

Under the Local Rules, "[b]efore the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case, any party may make a motion before a Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order." Civil L.R. 7-9(a). The Court's 2012 Order does not resolve all issues in the case: in particular, the Court has not finally ruled as to whether Defendants may continue to withhold certain classified information related to the Iraq War. Defendants thus may properly

1 request leave to file a motion for reconsideration of the 2012 Order. The Court should grant this
2 motion for leave to file if Defendants can show:

3 That at the time of the motion for leave, a material difference in fact or law exists
4 from that which was presented to the Court before entry of the interlocutory order
5 for which reconsideration is sought [and] that in the exercise of reasonable
6 diligence the party applying for reconsideration did not know of such fact or law
at the time of the interlocutory order.

7 Civil L.R. 7-9(b)(1). Defendants can meet this standard with regard to all grounds upon which
8 they seek reconsideration.

9 **I. Defendants Are Entitled to Move for Reconsideration and Correct Perceived
10 Deficiencies in Their Exemption 1 Withholdings Before Disclosure Is Ordered.**

11 Respondents' seek clarification that the Court's criticism of Defendants' explanations of
12 their Exemption 1 withholdings and segregation of them does not affect Defendants'
13 authorization to continue withholding certain information under Exemption 1. As further
14 explained in the proposed motion, Defendants understand the 2012 Order to authorize
15 Defendants to continue withholding two categories of information under Exemption 1: (1)
16 "weapons systems, weapons operations, and intelligence sources and methods"; and (2)
17 "operating procedures and methods of self-defense and target identification used in Iraq" (at least
18 until such time as the Court completes its review of the parties' show cause filings). *See* 2012
19 Order at 13, 24. If Defendants' understanding of the Order is correct, then no reconsideration of
20 this issue is necessary: Defendants' understand all information that they are still withholding
under Exemption 1 to fall into these authorized categories.

21 Defendants, however, recognize the possibility that the Court may interpret the Order
22 differently, and that the Court may contemplate disclosure of some information in these
23 categories based on the perceived failure of Defendants to provide detail and segregate. *Id.* At
24 24. If the Court were to interpret the Order in this way, Defendants are entitled to seek
25 reconsideration of the Order. The Court's 2007 Order generally accepted Defendants'
26 explanations of their Exemption 1 withholdings. *See* 2007 Order at 13 ("The Court concludes
27 that defendants have met their burden for justifying non-disclosure under Exemption 1."). Thus,

1 before the Court's 2012 Order, the Court had apparently accepted Defendants' justifications for
 2 their Exemption 1 withholding were fundamentally sound, and Defendants had a reasonable
 3 belief that their justification for the Exemption 1 withholdings did not require major revision or
 4 updating.

5 In its 2012 Order, the Court, based on the passage of time and changed factual
 6 circumstances (namely, the end of the Iraq War), revisited and partially overturned its previous
 7 ruling that Defendants had adequately justified their Exemption 1 withholdings. *See* 2012 Order
 8 at 7, 9-10. Thus, both the Court's understanding of the case and the facts on the ground have
 9 changed since Defendants last briefed the Court in 2008 concerning the Exemption 1
 10 withholdings. Accordingly, Defendants have shown the existence of "a material difference in
 11 fact or law . . . from that which was presented to the Court before entry of the interlocutory
 12 order" and that they did not know of this difference "in the exercise of reasonable diligence."
 13 Civil L.R. 7-9(b). Defendants are thus entitled to request that the Court reconsider its 2012
 14 Order to the extent that it requires disclosure under Exemption 1, and allow Defendants to
 15 attempt to address the Court's concerns about lack of detail and segregation, as Defendants have
 16 done in their Second Revised Vaughn Index and revised disclosures, attached to their proposed
 17 Motion for Clarification and Partial Reconsideration. Allowing Defendants to do so is consistent
 18 with the well-established practice of allowing the government to remedy any perceived problems
 19 with a Vaughn index before compelling disclosure of sensitive information *See, e.g., Wiener v.*
 20 *FBI*, 943 F.2d 972, 979 (9th Cir. 1991); *Gerstein v. Cent. Intelligence Agency*, No. C 06-4643
 21 (MMC), 2008 WL 4415080 at *13 (N.D. Cal. Sept. 26, 2008) ("Where an agency's affidavit is
 22 determined to be insufficient, and it appears that a more detailed affidavit could be presented, the
 23 court should permit the agency to provide a more detailed affidavit.").

24 **II. Defendants Are Entitled to Seek Reconsideration of the Court's Exemption 2
 25 Rulings Based on Major Changes in Exemption 2 Law that Occurred While the
 26 Case Was Pending.**

27 As discussed in greater detail in the attached proposed motion, Defendants have
 28 identified a small amount of Iraq-related operational and targeting information previously

1 withheld under Exemption 2 that is properly classified and thus should be withheld under
2 Exemption 1. As the Court acknowledges in the 2012 Order, 2012 Order at 14, there has been a
3 significant, relevant change in the law since Defendants last explained their withholdings under
4 Exemptions 1 and 2: namely, the Supreme Court's recent decision in *Milner v. Dep't of Navy*,
5 131 S. Ct. 1259 (2011), which overturned thirty years of precedent regarding the application of
6 Exemption 2, precedent on which Defendants had relied to justify their Exemption 2
7 withholdings.

8 Milner was decided less than a year before the Court issued the 2012 Order. At the time
9 that *Milner* was decided, Defendants did not know that any information they were withholding
10 entirely on the basis of Exemption 2 was also properly classified and thus should be withheld
11 under Exemption 1, as their original review of the documents had not identified this information
12 as classified. It was only in conducting a revised classification review of Documents 1-5 in
13 response to the 2012 Order that Major General Horst, an original classification authority,
14 determined that certain materials previously withheld under Exemption 2 should in fact be
15 classified. See Def.'s Response to Show Cause Order (Dkt. No. 96), filed Feb. 27, 2012, Ex. 1,
16 Declaration of Major General Karl R. Horst (Feb. 26, 2012) ¶¶ 4, 9, 10, 12, 17. As such, there
17 has been a significant change of law regarding Exemption 2, the precise relevance of which
18 Defendants were reasonably unaware of until after the Court issued the 2012 Order. Thus,
19 Defendants are entitled to seek reconsideration of the 2012 Order's requirement that they
20 produce this information.

21 **III. Defendants Understand the Court's Order to Authorize Them to Withhold
22 Photographs of the Faces of Overseas Service Members, But Should Be Allowed to
23 Seek Further Clarification.**

24 Defendants' third request is primarily for clarification, not an independent claim for
25 reconsideration. The Court's Order authorizes Defendants to withhold personally identifying
26 information of overseas or routinely deployable service members under Exemption 3, but also
27 denies Defendants' ability to withhold certain photographs under Exemption 6. 2012 Order at
28 15, 20. Defendants seek clarification that the Court's authorization to withhold personally
6

1 identifying information of overseas or routinely deployable service members includes the ability
 2 to redact portions of photographs disclosing their faces.

3 **IV. Defendants Are Entitled to Seek Reconsideration of the Court’s Decision Not to**
 4 **Allow Defendants to Withhold Names, Photographs, and Other Personally**
 5 **Identifying Information under Exemption 6 Given Significant Recent Precedent.**

6 Finally, the Court should grant Defendants leave to move for reconsideration of the
 7 Court’s ruling that Defendants cannot withhold names and similar personally identifying
 8 information of DoD personnel, including photographs of faces, under Exemption 6. Since
 9 Defendants last presented legal arguments to the Court regarding Exemption 6, there has been a
 10 significant change in the Exemption 6 case law. Namely, at the time, Defendants were only able
 11 to point to a small number of unpublished opinions in which federal courts had upheld the
 12 governments’ ability to withhold the names of Department of Defense (“DoD”) personnel under
 13 Exemption 6. *See* Def.’s Mot. for Summary Judgment (Dkt. No. 18), filed Nov. 3, 2006, 19.
 14 Since 2007, a number of federal courts have ruled that the government can in fact withhold the
 15 names of DoD personnel under Exemption 6. *See Schoenman v. Fed. Bureau of Investigation*,
 16 575 F. Supp. 2d 136, 160-61 (D.D.C. 2008); *Schwaner v. Dep’t of the Army*, 696 F. Supp. 2d 77,
 17 82-83 (D.D.C. 2010); *Bangoura v. Dep’t of Army*, 607 F. Supp. 2d 134, 147-49 (D.D.C. 2009).

18 Defendants did not previously bring these cases to the Court’s attention, as Defendants
 19 reasonably concluded that it was not necessary for them to do so. In the Court’s 2007 Order, the
 20 Court specifically found that “redactions of names of military personnel . . . fall under
 21 Exemption 6.” 2007 Order at 22. Indeed, after the 2007 Order, the parties treated this matter as
 22 a largely settled issue and did not address it in subsequent briefing. *See* Def.’s Renewed Mot. for
 23 Summary Judgment (Dkt. No. 66), filed Dec. 14, 2007; Pl.’s Opp’n and Mot. for Summary
 24 Judgment (Dkt. No. 69), filed Feb. 11, 2008; Def.’s Reply (Dkt. No 73), filed Mar. 18, 2008;
 25 Pl.’s Reply (Dkt. No 74), filed Mar. 31, 2008. As such, Defendants saw no need to inform the
 26 Court of these developments in the law of Exemption 6 that confirmed the Court’s conclusion in
 27 the 2007 Order. Now, the weight of authority clearly favors allowing the withholding of names,
 28 photographs of faces, and other personally identifying information under Exemption 6.

1 Defendants reasonably believed, based on the Court's 2007 Order, that there was no need to
2 bring this law to the Court's attention. As such, Defendants should be granted leave to move for
3 reconsideration of the Court's Exemption 6 ruling.

4 **CONCLUSION**

5 For the foregoing reasons, the Court should grant Defendants leave to file the attached
6 proposed Motion for Clarification and Partial Reconsideration.

7 Dated: March 14, 2012

8 Respectfully submitted,

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